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11 Attorneys for Representative Plaintiff  
12 and the Plaintiff Classes

13 **UNITED STATES DISTRICT COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**

15 EDWARD MUSGRAVE, individually,  
16 and on behalf of all others similarly  
17 situated,

18 Plaintiff,

19 vs.

20 ICC/MARIE CALLENDER'S  
21 GOURMET PRODUCTS DIVISION,

22 Defendant.

23 Case No. 3:14-cv-02006-HSG

24 CLASS ACTION

25 **JOINT REQUEST FOR DISMISSAL OF**  
26 **INDIVIDUAL CLAIMS WITH PREJUDICE**  
27 **AND DISMISSAL OF CLASS CLAIMS**  
28 **WITHOUT PREJUDICE AND ~~PROPOSED~~**  
**ORDER**

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1       **I. INTRODUCTION**

2           The parties, plaintiff Edward Musgrave (“Plaintiff”) and defendant ICC/Marie Callender’s  
3       Gourmet Products Division (“Defendant”), hereby jointly request dismissal of Plaintiff’s individual  
4       claims with prejudice and dismissal of the putative class claims without prejudice. Plaintiff has  
5       settled and released his individual claims against Defendant and no longer has standing to pursue the  
6       class claims herein. Because the proposed classes have not been certified and because no class  
7       members’ rights are affected in that no class members will be bound by or prejudiced by the  
8       dismissal of the class claims, the Court should dismiss this case without notice.

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10       **II. RELEVANT PROCEDURAL HISTORY**

11           Plaintiff filed this action on May 1, 2014. The parties conducted significant discovery and  
12       agreed to attend a mediation session before the Honorable Jack Komar (Ret.) on April 28, 2015. The  
13       case did not settle at that mediation, but the parties continued to exchange information and hold  
14       settlement negotiations over the following months. Eventually, the parties agreed to return to  
15       mediation before Judge Komar on November 5, 2015. At that second mediation session, the parties  
16       reached an agreement in principle to settle the case on an individual basis, and the parties have now  
17       executed a settlement agreement releasing all of Plaintiff’s individual claims against Defendant.

18  
19       **III. ARGUMENT**

20           The parties request that the Court dismiss Plaintiff’s individual claims with prejudice  
21       pursuant to the settlement agreement and dismiss the class claims without prejudice. The settlement  
22       encompasses all of Plaintiff’s claims against Defendant and does not resolve or bar any claims by  
23       any absent class member. Pursuant to Federal Rule of Civil Procedure 23(e), “[t]he claims, issues, or  
24       defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the  
25       court’s approval.” Although Rule 23(e) expressly refers to certified classes, the Ninth Circuit has  
26       previously held—that is, before Rule 23(e) was amended in 2003—that the rule applies to pre-  
27       certification dismissals and compromises. *Diaz v. Trust Territory of the Pac. Islands*, 876 F.2d 1401,  
28       1408 (9th Cir. 1989); *see also See Lyons v. Bank of America*, No. C 11-1232 CW, 2012 WL

5940846, at \*1 (N.D. Cal. Nov. 27, 2012). However, the rule changed in 2003, as explicitly noted by the Advisory Committee:

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be -- and at times was -- read to require court approval of settlements with putative class representatives that resolved only individual claims. *See* Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Fed. R. Civ. P., Rule 23 (Notes from 2003 Advisory Committee) (emphasis added).

If this Court decides to review the settlement despite the Advisory Committee's statement, the Court should approve it because all of the *Diaz* factors are satisfied. In *Diaz*, the Ninth Circuit stated that pre-certification approval was required "to ensure that [a settlement] is not collusive or prejudicial." *Id.* In making that determination, the Ninth Circuit stated that "the district court should inquire into possible prejudice from (1) class members' possible reliance on the filing of the action if they are likely to know of it either because of publicity or other circumstances, (2) lack of adequate time for class members to file other actions, because of a rapidly approaching statute of limitations, and (3) any settlement or concession for class interests made by the class representative or counsel in order to further his own interests." *Id.*

**A. ABSENT CLASS MEMBERS HAVE NOT RELIED ON THESE CLASS CLAIMS**

After a diligent search of internet sites, newspapers, and other news sources published in the United States, Plaintiff's counsel asserts it is unlikely there are putative class members that are aware of and have relied on Plaintiff's action in this Court. Applying the *Diaz* factors to a non-class settlement in a case that initially began as a putative class action, the Court in *Houston v. Cintas Corp.*, 2009 U.S. Dist. LEXIS 33704 (N.D. Cal. April 3, 2009) approved the settlement and dismissal without notice. In the *Houston* case, the Court noted that "although there has been some publicity regarding this case and articles in which some of the Plaintiffs were mentioned by name, it has been minimal." *Id.* at \*5. While this case has been the subject of some publicity, media attention has been minimal and mostly limited to professional legal news sources that are not likely read by

lay consumers. Accordingly, it is highly unlikely that any absent class member has relied on this case rather than pursuing an action of his or her own.

**B. ABSENT CLASS MEMBERS WILL NOT BE PREJUDICED BY ANY RAPIDLY APPROACHING STATUTE OF LIMITATIONS**

There is no danger that absent class members will be prejudiced by a rapidly approaching statute of limitations here. The filing of a class action on both federal and state law claims tolls the applicable statute of limitations for members of the putative class. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-554 (1974); *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1122 (1988). The statutes of limitations will resume when Plaintiff's class claims are dismissed. *See Chardon v. Fumero Soto*, 462 U.S. 650, 661-662 (1983) (whether tolling resulting from the filing of a class complaint has the effect of suspending or renewing the limitations period depends on the underlying statute of limitations); *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985) (statute of limitations resumed on plaintiff's Section 1983 claims after class certification denied).

Given the impossibility of calculating the actual remaining statute of limitations for each putative class member's claims, courts in this Circuit have measured this factor by assessing the time remaining on the statute of limitations of the original named Plaintiff's claims after tolling. In *Singer*, the court determined that notice was not necessary due in part to the fact that absent class members had anywhere from a one-year to a four-year tolled statute of limitations once the individual claims were dismissed. *Singer v. Am. Airlines Fed. Credit Union*, 2006 U.S. Dist. LEXIS 82147 (N.D. Cal. Oct. 30, 2006). "Based on the tolling of the statute of limitations as to the class which occurred by virtue of the filing of plaintiff's complaint, there is ample time for absent class members to commence a new action should they determine that such a case had merit." *Id.* at \*10. Plaintiff's claims, which incorporate a claim under California's Business and Professions Code, generally implicate a four-year statute of limitations. Plaintiff filed his case less than two years ago in May 2014. Thus, Plaintiff would not face any impending deadlines. As in *Singer*, there is ample time for class members to commence an action.

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C. **PLAINTIFF HAS NOT MADE ANY CONCESSION OF CLASS INTERESTS TO FURTHER HIS OWN INTERESTS**

Finally, the dismissal of the putative class claims without prejudice will not affect the rights of putative class members such that notice is necessary. Applying the *Diaz* factors to a non-class settlement in a case that initially began as a putative class action, the Court in *Houston v. Cintas Corp.*, 2009 U.S. Dist. LEXIS 33704 (N.D. Cal. April 3, 2009) approved the settlement and dismissal without notice, stating, “the parties do not seek to dismiss the class claims with prejudice and, therefore, they are not impacting the rights of potential class members.” *Id.* at \*6. Similarly, the class claims in this case are not being dismissed with prejudice. Indeed there has been absolutely no “settlement or concession” of class interests in resolving this action on an individual basis. As in *Houston*, no notice should be required here because no concessions of the class’ interests have been made.

IV. **CONCLUSION**

The parties request that the Court dismiss this case with prejudice as to the named plaintiff and without prejudice as to all absent members of the putative class.

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1 Dated: December 23, 2015

2 **SCOTT COLE & ASSOCIATES, APC**

3  
4  
5 By: /s/ Molly A. DeSario  
6 Molly A. DeSario, Esq.  
Attorneys for the Representative Plaintiff  
and the Plaintiff Classes

7 Dated: December 23, 2015

8 **GRAY DUFFY LLP**

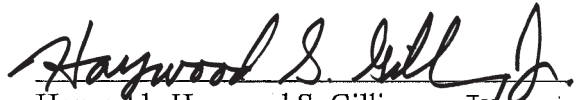
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11 By: /s/ Richard Williams  
12 Richard M. Williams, Esq.  
13 Nathan B. Lee, Esq.  
Attorneys for Defendant  
ICC/Marie Callender's Gourmet Products Division

14  
15  
16 **PROPOSED ORDER**

17 Pursuant to the foregoing Joint Request for Dismissal, Plaintiff's individual claims are  
18 dismissed with prejudice and the class claims herein are dismissed without prejudice.

19  
20 **IT IS SO ORDERED.**

21  
22 Dated: 12/28/2015

23   
24 Honorable Haywood S. Gilliam, Jr.  
United States District Judge  
25  
26  
27  
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**ATTESTATION**

In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other Signatories, which shall serve in lieu of his/her/their signatures on the document.

Dated: December 23, 2015

**SCOTT COLE & ASSOCIATES, APC**

By: /s/ Molly A. DeSario  
Molly A. DeSario, Esq.  
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